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ABSTRACT

Noting the lack of a dispute mechanism for determining whether an advertising practice is truly deceptive without generating the costs and negative publicity produced by traditional Federal Trade Commission (FTC) procedures, this paper proposes a model based upon early termination of the issues through jointly commissioned behavioral research. The paper points out that in order to institute the model, it is necessary for the FTC to: (1) promulgate, as either industry guides or regulations, a basic outline of what it considers sufficient scientific methods to justify a "reasonable basis" to substantiate advertising claims and to measure advertising effects; and (2) apply these methods to the early resolution of disputes over deception. The paper describes a "trial run" of the model's concepts, showing that it worked to the benefit of the FTC. (FL)

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QUANTITATIVE RESEARCH: A DISPUTE RESOLUTION MODEL FOR FTC ADVERTISING REGULATION

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By Jef I. Richards and Ivan L. Preston

ABSTRACT:

This paper proposes a model for alternative dispute resolution of Federal Trade Commission deceptive advertising charges, based upon early termination of the issues through jointly commissioned behavioral research. To institute this model it is first necessary for the Commission to define some presumptively acceptable methods of scientific research. Some suggestions are offered to assist formulation of these standards, and additional benefits are discussed.

CS 209 905

QUANTITATIVE RESEARCH: A DISPUTE RESOLUTION MODEL FOR FTC ADVERTISING REGULATION

By *Jef I. Richards and
**Ivan L. Preston

A perusal of Federal Trade Commission (FTC) activities directed at suspected deceptive advertising practices in the past few years reveals a vast preponderance of cases terminating in consent decrees.[1] Some probable contributors to this popularity of prosecutorial preemption are the time and cost of seeing litigation to its consequence, the track record for successful prosecution by the Commission staff, and the detrimental publicity generated by an adverse decision in an adjudicated dispute. None of these factors, however, bear directly upon the merits of an FTC complaint—whether the meaning conveyed by an ad really is deceptive—but simply act as a deterrent to an advertiser pursuing its First Amendment rights. Enactment of a dispute resolution mechanism based upon empirical assessment of the deceptive likelihood of advertising, capable of being implemented early in the administrative process and long before the major costs of litigation are incurred, would offer a viable alternative to the failings of adjudication and the traditional use of consent decrees, by looking directly to the merits of the charges made against an advertiser.

This article proposes such a model, and discusses the potential problems and benefits to be encountered in promulgating this contemporary approach to legal problem-solving. The model is predicated on the idea that if an advertisement can be *proved* deceptive to the advertiser before enduring the cost and publicity of traditional FTC procedures, there will be no advantage in challenging the allegation. Conversely, if the FTC receives convincing proof that consumers are not likely to be deceived by and

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1 An exact percentage of actions which end in consent depends upon whether one includes only cases in which advertising claims are central. A content analysis, conducted by the authors, of *FTC Decisions* from 1980 to 1983 (volumes 95-102) reveals that approximately 85% of those published cases ended in consent decrees.

advertising claim, it will probably dismiss the complaint against the advertiser rather than risk the embarrassment and cost of pursuing a lost cause. Finally, a regulatory system based upon the measured fact of consumer perception of an ad's meaning represents a more equitable approach than one based upon what a few Commissioners may believe that consumers think about an ad.[2]

As proposed here, the application of the model demands two separate steps by the FTC: 1) the development of formal research guidelines for the conduct of quantitative research, and 2) the adoption of a procedure which applies behavioral research to an early determination of the facts at issue. The first step must precede the second, for without a systematic and consistent approach to research no advertiser can be assured of equal and fair treatment in the research process, which is essential to adoption of the procedure by the advertising community.

Consistency of approach may also provide a more global benefit of giving the FTC some insight into the true nature of deception, as patterns begin to emerge in the results of these studies. If, for instance, behavioral research in several cases should discover the phrase "new and improved" to consistently create misconceptions in the minds of consumers, those tests could serve as the basis for subsequent limitations on the use of this phrase. In the same manner, claims traditionally thought to be deceptive *per se* may well be discovered to be non-deceptive in many or all circumstances. One incident of such a mistaken belief by the FTC, where empirical research revealed the misconception, occurred when the Commission went overboard in its attempts to protect children from the undue influence of advertisers.

In 1974, the FTC proposed a rule prohibiting certain advertising directed at children, where products were promoted by flaunting the inclusion of "premiums."[3] The Commission felt that appeals of this variety, such as selling breakfast cereal with toys buried inside, encourage children to ask for products based upon the premiums associated with the product. This, in turn, discourages the children from learning proper buying habits and how to judge the relative merits of competing products. This proposal was followed by a research project which found that, to the contrary, under some conditions a child's attention to the premium would act as a catalyst to prompt the child to learn more about the product.[4] The proposed rule was eventually withdrawn.

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2 One review of advertising regulation notes:

> Studies of the sources of consumer information, of the influence that different kinds of information have on the purchase decision, and of the importance of factors such as brand loyalty or experience with a product, reveal that deception is a very complex process which is not always assessable merely by looking at the face of an ad. This research suggests that *the FTC's assumptions about the persuasive effects of advertising may not conform to empirical realities concerning the causes of consumer product choices.*

Comment, *Federal Trade Commission Deceptive Advertising Regulation: A Proposal for the Use of Consumer Behavior Research*, 76 N.W. U.L. Rev. 946 (1982). (Emphasis added)

3 Federal Trade Commission, *Proposed Trade Regulation Rule Regarding Premiums in Children's Advertising*, 39 Fed. Reg. 25505 (1974).

4 Shimp, Dyer, & Divita, *Experimental Test of the Harmful Effects of Premium-oriented Commercials on Children*, 3 J. of Cons. Res. 1 (1976).

Research findings discovered that children were not necessarily as gullible as common wisdom would suggest. It is certainly within reason to suspect that other regulations or Commission decisions might be found equally over-cautious, or even lacking in sufficient caution, as patterns emerge in individual case studies.

The model presented here offers several benefits, as indicated, to both the evaluation of a specific charge of deception and to the FTC's overall concept of what constitutes deception. Although this model directly concerns only the issue of an ad's *meaning*, and not the multitude of other issues facing the Commission in its regulation of advertising, adoption of this model would represent substantial progress from the present system of prosecution.

Stage I: Empirical Research Standards

The Need for Behavioral Research

The FTC standard of deception is predicated on consumer misunderstandings, rather than any finding of fault or impropriety by the advertiser[5], so the perception of the consumer is quintessential to its proper application.[6] *Explicit* claims in advertising are largely measurable for accuracy at the point they are transmitted, without regard to how the message is received, but advertisements formulated around sex, status, or other emotional appeals[7] convey misinformation indirectly through *implication*, and therefore are not so easily measured.[8] If a product is promoted, for example, by a claim that it will increase gasoline mileage in an automobile by 20 percent, and it is unable to do so, this claim is easily measured and disproved.[9] But, what about a vitamin supplement that claims to help "iron-poor blood," and seems to imply that this malady is common in people that frequently feel tired?[10] Deciding whether this implication is made by the advertising in question is not quite so simple. It is in just such a situation that the utility of behavioral research can be realized, since such research can probe to discover what consumers actually believe the ad to mean.

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5 Neither intent nor bad faith need be shown to sustain a charge of deception, since they are not elements of the violation. *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir.), *cert. denied*, 430 U.S. 983 (1976); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *FTC v. Sterling Drug, Inc.*, 317 F2d 669, 674 (2d Cir. 1963).

6 *See*, discussion of consumer perception of advertising in Richards and Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 Ga. L. Rev. 77 (1981).

7 For a more complete treatment of emotionally conditioning advertising techniques *see* Richards and Zakia, *id. See, also*, Gardner, *A Conceptual Framework for Advertising* (1982).

8 *Infra* note 18.

9 *Cliffdale*, 103 F.T.C. 110 (1984).

10 *J.B. Williams v. FTC*, 381 F.2d 884 (6th Cir. 1967).

This latter, implied, manner of appeal has proliferated over the past years, exacerbating the already problematic job of regulating advertising.[11] A few years ago, FTC Commissioner Mary Gardiner Jones made the following statement:

> The present public policy in advertising is to produce truth and honesty. An interesting question is whether the existence of that policy is pushing advertising away from direct product claims which can be validated and subject to the F.T.C. Act, into some of the less definable, less verifiable product claims and advertising themes including this kind of psychological associating with individual status and anxieties. I don't think it is completely true, but we have to remember in formulating public policy that the so-called "cure" might push people into doing things which are more objectionable than the original problem to which the "cure" was designed to be applicable.[12]

Morris B. Holbrook, an Assistant Professor of Marketing at Columbia University, published a research paper in 1978 discussing "factualness" and "evaluativeness" of advertisements.[13] The former term refers to the "logical, objectively verifiable descriptions of tangible product features"[14], and the latter describes the "emotional, subjective impressions of intangible aspects of the product."[15] One striking discovery made in this research is that, though factual messages may be most effective in favorably influencing some beliefs (at least for well-educated consumers buying relatively technical products), emotional appeals were barely distinguishable from the factual ones in their influence on the consumer. Indeed, a review of pertinent research by Rotfeld and Preston found that there was *no* difference between

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11 Professor Terence A. Shimp, at the University of South Carolina-Columbia, remarks:

> Regulatory agencies have generally assumed a more aggressive position in performing their statutory mandates: The FTC, for example, has expanded and intensified its efforts to regulate unfair and deceptive business practices ... The irony of the FTC's expanded regulatory activity is that there probably has not been any significant diminution in the extent of advertising deception. What has occurred instead is that blatant deception has been replaced with subtle forms. Regulatory pressure has likely led advertisers to resort to less discernible forms of advertising misrepresentation as a means of avoiding FTC detection.

Shimp, *Social Psychological (Mis)Representations in Television Advertising*, 13 J. of Consumer Affairs 28 (1979). *See, also*, Resnik and Stern, *An Analysis of the Information Content in Television Advertising*, 41 J. of Mktg. 50 (1977); Shimp and Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising*, 45 J. of Mktg. 22 (1981).

12 Jones, *The Cultural and Social Impact of Advertising on American Society*, 8 Osgood Hall L. J. 65, 87 (1970).

13 Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. Mktg. 545 (1978); *see, also*, Shimp and Preston, *supra* note 11. Non-factual types of appeals have been discussed extensively by behavioral researchers, and have been called, variously, "social-psychological", Shimp, *supra* note 11; "feeling", Golden and Johnson, *The Impact of Sensory Preference and Thinking Versus Feeling Appeals in Advertising Effectiveness*, 10 Advances in Consumer Research 203 (1983); "arbitrary", Preston, *Theories of Behavior and the Concept of Rationality in Advertising*, 17 J. of Communication 211 (1967); and "social reality" appeals, Mizerski and Settle, *The Influence of Social Character on Preference for Social Versus Objective Information in Advertising*, 16 J. of Marketing Research 552 (1979).

14 Holbrook, *supra* note 13, at 547.

15 *Id.*

these two forms of sales patter.[16] In other words, emotional ploys had an impact on the public very nearly as persuasive as hard facts.

This provides an argument that emotional appeals are no less worthy of FTC attention than factual misstatements.[17] Additionally, it appears that advertisers use such techniques with abandon, a large majority of ads being of the emotional genre.[18]

These non-factual devices present peculiar difficulties when compared to regulating factual misclaims. Emotional or implied claims may be interpreted differently by each consumer. For the regulatory agency to decide whether many of those interpretations are materially deceptive calls for something akin to clairvoyance. The relatively "objective" quantitative research, unlike the necessarily subjective Commission *expertise*[19], is a practical approach to help the FTC evaluate the likelihood-to-mislead of these emotional devices.

A recent FTC decision, in *Thompson Medical*[20], addressed the proof of both explicit and implicit claims. The former, it declares, are "ones that directly state the representation at issue. Because the message is stated unequivocally, it is reasonable to interpret the ads as intending to make the claim."[21] Implied claims, on the other hand, range from those that are very nearly explicit to those that barely suggest some claim, so the Commission uses several fact-finding tools to assess the potential deceptiveness of implications:

> One is to look at the evidence from the advertisement itself. We often conclude that an advertisement contains an implied claim by evaluating the contents of the advertisement and the circumstances surrounding it. This technique is primarily useful in evaluating advertisements whose language or depictions are clear enough, though not express, for us to conclude with confidence after examining the interaction of all the different elements in them that they contain a particular implied claim.
>
> If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable . . . .

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16 Rotfeld and Preston, *The Potential Impact of Research on Advertising Law*, 21(2) J. of Advertising Res. 9, 12 (1981).

17 Reed and Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 Ga. L. Rev. 733 (1977); Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 Am. Bus. L. J. 171 (1975); Comment, *Psychological Advertising: A New Area of FTC Regulation*, 1972 Wis. L. Rev. 1097 (1972).

18 One empirical study determined that twice as many advertisements consist of basic persuasion as those consisting of basic information: Marquez, *Advertising Content: Persuasion, Information or Intimidation?*, 54 Journalism Q. 482 (1977). Another study appears in Pollay, Zaichkowsky, and Fryer, *Regulation Hasn't Changed TV Ads Much!*, 57 Journalism Q. 438 (1980).

19 LaRue, *FTC Expertise: A Legend Examined*, 16 Antitrust Bull. 1 (1971), criticizes the concept of deference to Commission findings by the courts, arguing that the diversity of the FTC jurisdiction and the backgrounds of the individual Commissioners make any significant degree of expertise an impossibility.

20 104 F.T.C. 648 (1984).

21 *Id.*, at 788.

> The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question. *Such evidence will be in the form of consumer survey research for widely distributed ads* .... Where we use surveys in lieu of individual testimony, the surveys are methodologically sound; they draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly.[22]

While other forms of evidence are used and considered acceptable by the Commission[23], it is clear from both the nature of implied claims and the position of the FTC that consumer behavior research is the best possible form of evidence when non-explicit appeals are encountered. Over the past decade the FTC has become more receptive to behavioral data, which is clearly evidenced by a notable increase in the number of cases in which such data has been presented.[24] FTC procedures and guidance in the past did not promote the use of more systematic and scientific analysis of consumer beliefs[25], but despite the increased prevalance of behavioral data there has been little improvement in this area.[26] For instance, no guidelines have been promulgated to describe what scientific procedures are presumptively acceptable to the Commission as proof of *innocence* by the advertisers, nor is there any clear definition as to how many consumers must be misled by an ad for it to be indefensibly deceptive.[27]

Regulatory Reluctance

The impact that concerns the advertising regulators is the belief about, or perception of, the advertised product or brand being promoted, that is conveyed to consumers via the advertisement. The law,

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22 *Id.* at 789-90. *See, also*, Preston, *Data-Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deceptiveness is Required*, Amer. Bus. L. J. (1986, in press).

23 *Id.* at 790.

24 Rotfeld and Preston, *supra* note 16, examines numerous research projects that were conducted during the 1970s, and cites cases in which some of those results were presented.

25 Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 Kan. L. Rev. 559 (1969).

26 Barnes, *The Significance of Quantitative Evidence in Federal Trade Commission Deceptive Advertising Cases*, 46(4) Law & Contemp. Prob. 25 (1983).

27 Commissioners Pertschuk and Bailey, criticizing the Commission's *Policy Statement on Deception*, in *Cliffdale*, 103 F.T.C. 110, 174 (1984), state that:

> The Commission has never identified a minimum percentage of consumers who must be misled in order to find deception; nor has it identified any percentage as "per se" substantial. Indeed those decisions that have discussed extrinsic evidence as to the percentages of consumers who could be misled suggest that the number of consumers adequate to constitute a "substantial number" will vary depending on the nature of the claim and the consequences of the deception. Generally, twenty or twenty-five percent may be considered a substantial number. However, a smaller percentage may be sufficient if physical injury or large monetary loss could result from consumers being misled.

Analysis of the Law of Deception, enclosure in letter to Congressman John D. Dingell (Feb. 28, 1984). Though prior caselaw does indicate some figures considered proper by the Commission, the recent stance of the Commission being attacked in that statement adds somewhat to the uncertainty. It is likely, however, that many former cases turn on percentages of evidenced deception that would be found to be inadequate for prosecution under today's attitudes. *See*, Preston and Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 John Marshall L. Rev. (1986, in press).

however, is frequently given to ignore public perceptions, even when that is the very issue being adjudicated.[28]

Deceptive advertising is measured against a ruler of whether or not the subject communication has a "capacity or tendency"[29] or "likelihood"[30] to mislead the public, but the FTC often makes no attempt to poll public perceptions, beliefs, or attitudes for the purpose of gauging such a likelihood-to-mislead.[31] The approach to finding this threshold has most often been for the Commission to apply its own expertise/opinion as to what may deceive the public[32], though it gives little indication where it acquired this omniscient perception of public beliefs.[33]

Though the Commission is amenable to behavioral research, and claims a preference for it in some circumstances[34], it has taken no active measures to assist or encourage the introduction of surveys or other

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28 This problem extends well beyond advertising regulation. One additional example is the area of "obscenity" regulation. See Richards, *Obscenity and Film: An Empirical Dilemma*, 6 Loyola Entertainment L. J. 7 (1986). Bates, *Pornography and the Expert Witness*, 20 Crim. L. Q. 250 (1978); Lamont, *Public Opinion Polls and Survey Evidence in Obscenity Cases*, 15 Crim. L. Q. 135 (1972-73); Stern, *Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation*, 20 Case West. Res. L. Rev. 527 (1969).

29 *See FTC v. Standard Education Society*, 302 U.S. 112 (1937); *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942); *Newton Tea and Spice Co. v. United States*, 288 F. 475 (6th Cir. 1923); *Jacob Siegel Co. v. FTC*, 150 F.2d 751 (3rd Cir. 1944); *Beneficial Corporation v. FTC*, 542 F.2d 611 (3rd Cir. 1976).

30 It should be recognized that there is no consensus regarding what percentage of the public represents sufficient deception, or with what probability, to justify remedial legal action. This is particularly true given the decision in *Cliffdale*, 103 F.T.C. 110 (1984), which misstates the former standard as "capacity *and* tendency to deceive," thereby subtly altering history, *id.* at 165. Through this misrepresentation the Commission justified changing its stated standard to a more strict "likelihood" probability. *See*, Preston and Richards, *supra* note 27.

31 A content analysis conducted on all 3,337 cases that appeared in *FTC Decisions* during the period from the FTC's inception in 1914 through 1973 reveals that only 206 of those cases involved any showing of consumer perception, and, of those, 194 were simply instances where consumers hand-picked by one or both of the parties were brought in to testify. It appears, therefore, that up until 1974 only 12 cases involved surveys that *may* have had some scientific validity of "representativeness" of the buying public. Brandt and Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception*, 41 J. Mktg. 54 (Jan. 1977). But, see, Rotfeld and Preston, *supra* note 23, which finds a recent trend toward greater use of survey evidence. *See, generally*, Preston, *supra* note 22.

32 Brandt and Preston, *supra* note 31. Internal Commission evidence was found applied in 94.7% of the cases examined. The Seventh Circuit in 1944, long before survey research methods reached their present sophistication, upheld the ability of the Commission to determine deceptive tendencies in lieu of such evidence:

> The Commission was not required to sample public opinion to determine what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisement, and then to decide for itself whether the practices engaged in by the petitioner were unfair or deceptive.

Zenith v. FTC, 143 F.2d 29 (7th Cir. 1944).

33 "Why questions of meaning should be submitted to the virtually unreviewable discretion of five commissioners of the FTC has never been articulated ... [T]here is no reason to believe that commissioners of the FTC have unusual capacity or experience in coping with questions of meaning." Pitofsky (writing as former Commissioner), *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 678 (1977).

34 *Supra* accompanying text at note 22.

measures of perceptions into its evaluations of deception.[35] Even if defendants desire to present evidence of this variety, the FTC offers them no formal direction as to what methodologies will be recognized as scientifically valid. Only through careful study of former advertising cases which involved scientific evidence can any direction be gleaned. In fact, more methodological guidance can be found in cases involving "substantiation" of product claims than in those concerning the determination of an advertisement's meaning through scientific research.[36] Even in the substantiation area there has been criticism by advertisers that FTC requirements are unduly vague and imprecise.[37]

In 1916 Louis D. Brandeis, author of the famed "Brandeis Brief"[38] which introduced quantitative methodology to the law, made the following comment about the need for integration of various other disciplines with the law:

> The judge came to the bench unequipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in the lawyers who presented cases to him. For a judge rarely performs his functions adequately unless the case before him is adequately presented.[39]

This remark, of 70 years past, still adheres. The Commission seems better equipped to deal with evidence that is more familiar to legal advocacy than public perceptions, even if it is willing to consider perceptual data.

The meaning of an ad in the mind of a consumer, however, is a question of *fact*, not of *law*.[40] The primary fault, where advertising litigation circumvents a fact-finding approach to consumer beliefs, lies not upon the Commission, whose function is akin to a judge. It is, rather, the deficiency of the advocates presenting these cases for too frequently neglecting to offer proof of consumer beliefs beyond the scientifically invalid testimony of purposively selected consumers or the unqualified opinions of supposed

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35 Though the Commission has done nothing to aid defendants charged with unfair or deceptive advertising practices to introduce evidence of this variety, there is some degree of "encouragement" to develop this evidence, stemming from respondents' opportunity to observe the FTC's increasing dependency on consumer opinion data to support its own position.

36 Preston, *Description and Analysis of FTC Order Provisions Resulting from References in Advertising to Tests or Surveys*, Pepperdine L. Rev. (1986, in press). *Infra* note 46.

37 *See, e.g., Bristol-Myers Co. v. FTC*, 738 F.2d 554, 560 (2d Cir. 1984).

38 The "Brandeis Brief" was filed in the case of *Curt Muller v. State of Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908), successfully defending an Oregon statute providing a ten-hour maximum workday for women. The brief included a mere two pages of legal argument, and in excess of 100 pages of statistical matter regarding the economic and physiological issues involved. *See* Urofsky, *A Mind of One Piece: Brandeis and American Reform* (1971).

39 Brandeis, *The Living Law*, 10 Ill. L. Rev. 461, 470 (1916).

40 *Block Drug Co.*, 92 F.T.C. 852, 912 (1978).

"experts."[41] This is not to say, however, that there is nothing that can be done by the Commission, procedurally, to aid and provide direction for presentation of this information.[42]

Lawyers, as a rule, tend to avoid and mistrust quantitative data. This apprehension by the profession continues despite the growth of quantification techniques and approaches in legal analyses.[43] In reality, terms like "weight of evidence" and "balancing of interests" are quantitative legal theories.[44] So, too, is "likely to mislead". While the number of prospective purchasers required to be potentially deceived in order to invoke legal sanction is a question of law, the likelihood-to-mislead is a question of fact, and the social scientists' empirical tools, available to the lawyer, are techniques probative of these facts.[45]

These fact-finding methods are less speculative than Commission expertise and should consequently be promoted as a means of testing the charges of an FTC complaint. The following sections will explore the possible steps that might be taken by the Commission to assist advocates in pursuit of empirical inquiries into public beliefs as a measure of deception, and finally will show how these steps can play a role in the institution of a quantitative dispute resolution model.

Informal Methodological Guidance

The need for a regulatory body to construct parameters of scientific propriety, to meet the rigorous demands of evidentiary sufficiency, is not a new one. The FTC has, itself, faced this need frequently outside the arena of behavioral evidence, when calling into question the claims of physical properties or functions of a product. For example, marketers are required to have a "reasonable basis" to believe their product

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41 These "experts," in the past, have not even needed to be experts of attitudes or perceptions. For example, in *Charles of the Ritz v. FTC*, 143 F.2d 676 (2d Cir. 1944), a dermatologist was qualified as an expert to testify as to what the "average woman" would believe the name "Rejuvenescence" to mean, even after he testified that a skin cream by this name might cause a woman to believe that it is "something which would actually cause her youth to be restored." A finding by the Commission that this name had a capacity to deceive, based on such evidence, was upheld.

42 Professor Ernest Gellhorn, evaluating the methods used for proving deception in FTC advertising Cases, claimed:

> Until the FTC establishes sensible ground rules for the preparation and presentation of surveys in cases where consumer understanding is a significant issue ... the partisan survey is an unduly risky, expensive, and time-consuming method for one party to prove as single issue in the case.

Gellhorn, *supra* note 25, at 567.

43 Silas, *Law Plus: Social research use is rising*, 70 ABA J. 39 (Nov. 1984), quotes Professor John Heinz, Northwestern University School of Law: "Judges are skeptical and somewhat fearful about evaluating statistical information. If it's a question of social science, they may say, 'I know this', but if it's a chemical question, they know they don't know the answer." *See, generally*, Rosenberg, *Quantitative Methods for Judges, Lawyers and Law Teachers*, from Allen and Caldwell (eds.), *Communication Sciences and Law: Reflections from the Jurimetrics Conference* 171 (1965).

44 Ball, *The Trial Court: Probability Theory and Jury Issues*, *Id.* at 179-90, gives examples where many of these legal approaches to probability make inadequate or even incorrect assumptions.

45 A discussion of the relevancy of scientific evidence appears in Note, *Evolving Methods of Scientific Proof*, 13 N. Y. L. Forum 679 (1967), citing *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). The article recognizes that the basic principle of admissibility of a scientific technique is its "general acceptance in the particular field in which it belongs", at 682.

claim, usually based on scientific testing, before the claim can be published.[46] This is the basis of the Commission's advertising substantiation program.[47]

While there are certain obvious differences between testing product attributes and surveying public perceptions of an advertisement, both demand some standard of scientific certainty and both are vulnerable to threats to their measurement reliability and validity. An explanation of acceptable scientific procedures would minimize speculation by advertising agencies when attempting in good faith to comply with the "reasonable basis" requirement[48] of the ad substantiation program.

The extent to which the FTC has gone, in spelling out for advertisers what they must do to be assured that their basis is reasonable enough, is typified by a recent Policy Statement:

> The Commission's determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.[49]

While the use of consumer surveys and other such behavioral data is not the sole focus of the ad substantiation requirement, no clearer formal policy has been published by the FTC for *any* of these uses.

While the FTC has yet to issue a policy statement or to promulgate regulations regarding presumptively acceptable research methods, many of the Commission's decisions speak to various aspects of this problem.[50] An example of this type of assistance is the mandate that substantiation be supported by two well-controlled studies in some cases.[51] Another now familiar requirement is that well-designed clinical studies should be "double-blinded."[52] Unfortunately, this approach to interpreting regulatory intent often requires inferring what is allowed indirectly from what is forbidden.

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46 See Federal Trade Commission Report, *Federal Trade Commission Policy Statement Regarding Advertising Substantiation Program*, 48 Fed. Reg. 10471 (1983), 47 A.T.R.R. 234 (1984), appended to *Thompson Medical*, 104 F.T.C. 648, 839 (1984); *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982); *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1336 (2d Cir. 1974), *cert. denied* 419 U.S. 993 (1975). *See, also*, FTC Staff Report, *Evolution and Evaluation of the Ad Substantiation Program since 1971* (Dec. 1, 1978); Comment, *Ad Substantiation Program: You Can Fool All of the People Some of the Time But Can You Fool the FTC?*, 30 Am. U. L. Rev. 429 (1981).

47 *Id.*

48 *Pfizer, Inc.*, 81 F.T.C. 23 (1972).

49 *Federal Trade Commission Policy Statement Regarding Advertising Substantiation Program*, 48 Fed. Reg. 10471 (1983), 47 A.T.R.R. 234 (1984), appended to *Thompson Medical*, 104 F.T.C. 648, 839 (1984).

50 *See, generally*, Preston, *supra* note 36.

51 *Thompson Medical*, 104 F.T.C. 648 (1984); *American Home Products*, 98 F.T.C. 136 (1981, *modified, American Home Products v. FTC*, 695 F.2d 681 (3rd Cir. 1982), *modified order*, 101 F.T.C. 698 (1983).

52 *American Home Products, supra* note 50; *Bristol-Myers*, 102 F.T.C. 21, 390 (1983), *aff'd, Bristol-Myers v. FTC*, 738 F.2d 554 (2d Cir. 1984), *cert. den.*, Sup. Ct. Slip Op. (1985).

Although many typical expectations of the FTC can be drawn from these cases, the Commission's reluctance to directly address the overall need for direction in this area is unmistakably clear. The agency seems anxious to embrace the dictum from *Pfizer*[53] that the amount of evidence required to substantiate a claim can only be determined on a "case-by-case basis."[54]

The failure of the FTC to provide presumptively acceptable guidelines for studying product claims has probably already contributed to companies having their research techniques questioned. *Warner-Lambert Company*[55], contesting the manufacturer's promotional claim that Listerine can cure or prevent colds, brings into question an experiment's failure to provide adequate "blinding" of the control group used[56], even though the experimenter incorporated one form of blinding in the test design. The Commission simply declared the procedure inadequate, and went on to imply that a new study would have to be a "double-blind" design.[57] In this case the company offers substantiation of its claim, but it turns out not to be reasonable *enough* in the eyes of the public's guardians.[58]

Similarly, *Litton Industries, Inc.*[59], presents an example of research methodologies falling under FTC fire. A series of advertisements, here, were run claiming that 73% of technicians servicing microwave ovens recommend Litton products. The interesting facet of this confrontation is that the challenged representations resulted from two surveys that Litton had earlier hired an independent testing agency to produce for internal use only.[60] No advertisements based upon these surveys were intended at the time the surveys were commissioned, so it is unlikely that the studies were constructed with any promotional bias in mind. The methods used were apparently reasonable for Litton's intended use. The FTC, however, decided that the surveys were the result of faulty research techniques that allowed the introduction of bias into the results, and that the advertisements were consequently deceptive for lack of a "reasonable basis" supporting the proffered claims.[61] Again the Commission was quick to condemn what it considered to be inadequate

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53 *Supra* note 48.

54 *See, Sperry Corp., DKG, North American Philips, and McCaffrey & McCall*, 104 F.T.C. 549 (1984).

55 86 F.T.C. 1398 (1975), *modified*, 562 F.2d 749 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

56 *Id.* at 1509-12. The concept of "blinding", as used here, involves treating the control group with a placebo to minimize the bias which might occur where the participants do not feel that they are receiving the benefit of a treatment which the experimental group expects some benefit to accrue from their treatment. The mere expectation by the experimental group can result in a reported benefit, even though the treatment itself offers no real value.

57 *Id.* at 1510, note 1, and 1511. This procedure not only "blinds" the control group, but also the observer, where this examiner would not know which subjects were receiving the treatment and which ones received only a placebo.

58 Actually, two different sets of tests were offered to support the claims, referred to as the *St. Barnabas* test and the *Reddish Cold* tests, but both were found to suffer from these fatal flaws.

59 97 F.T.C. 1 (1981).

60 *Id.* at 22.

61 *Id.* Particularly, the sampling was not based upon the population of all agencies which serviced Litton's microwave ovens, but only the name of agencies authorized to do in-warranty work on Litton ovens. Other faults were also cited in the methodology.

research methods, but it has yet to take measures to elucidate with any specificity what methods are adequate.[62]

There are many cases addressing FTC requirements for substantiation, but there are fewer dealing with behavioral surveys and experiments to assess meaning in an ad. Many of the same requirements might be assumed to apply, but the nature of behavioral research is less controllable and there are other differences which necessitate some additional specific requirements not encompassed by substantiation tests and surveys.[63] It would therefore be helpful to have a formal declaration of requirements for research on ad meanings that goes at least as far, or better yet even farther, than what the FTC has accomplished in the substantiation area.

In addition to research on advertising content, policies regarding scientific evidence might also be tailored to instances where the Commission staff seeks the inclusion of corrective measures in a challenged campaign.[64] In his argument for the retention of corrective powers in the arsenal of FTC power-tools in 1976, Richard S. Cornfeld proposed the use of empirical consumer data as a litmus for determining whether a lingering impression persists in the minds of consumers sufficient to justify a remedy so potentially detrimental to the targeted advertiser.[65] This position takes on substance in light of the *Firestone* case.[66]

Firestone was charged with deceptive advertising for an ad four years after that promotion was discontinued. It took that long to decide whether or not to seek corrective inclusions in future advertisements. By that time, there may well have been no lingering effect of the prior deceptive practices. It is possible, if not probable, that consumers who were affected by the older "deceptive" advertising will no longer remember or be under the influence of those ads. An advertiser need not be extraordinarily intuitive to recognize the advantage under these circumstances of exercising the option to assess consumer beliefs

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62 Other cases have met similar resistance in lieu of guidance by the Commission. *See, e.g, The Kroger Company*, 98 F.T.C. 639 (1981), *modified*, 100 F.T.C. 573 (1982); *California Milk Producers Advisory Board*, 94 F.T.C. 429 (1979); *ITT Continental Baking Company, Inc.*, 83 F.T.C. 865 (1973), *modified*, 532 F.2d 207 (2d Cir. 1976), *order superseded*, 90 F.T.C. 181 (1977).

63 Probably the best specification of consumer survey considerations by the FTC is found in a footnote, in *Bristol-Myers*, 85 F.T.C. 688, 744 n. 14 (1975). It notes several factors, including the experience of the researcher, experience of the interviewers, experience with the kind of work involved, the accepted nature of the survey style, controls and validation procedures, sampling procedure, biased interest of the sponsor, and the independent nature of the researchers. However, while it identifies these important factors, it does not go far in explaining the requirements of each.

64 Corrective advertising is a relatively recent development, legitimized by *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). *See, also, Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972); *Standard Oil Co. of California*, 84 F.T.C. 1401 (1974); Faller, *The Federal Trade Commission Has the Power to Order Corrective Advertising in Cases Where the Lingering Effect of Prior Advertising Influences Future Consumer Decisions*, 47 U. Cin. L. Rev. 129 (1978).

65 Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 6 Iowa L. Rev. 639 (1976). This article advocates retention of the corrective advertising mechanism, but was written just prior to the *Warner-Lambert* decision, *supra* note 64.

66 *Firestone Tire and Rubber Co.*, 81 F.T.C. 398 (1972).

before deciding to assume the expense of arguing with the FTC in court. It would be equally advantageous for the FTC to study these impacts before facing impending embarrassment in such a case.[67]

The law provides the FTC with powers and procedures by which it is able to promulgate either industry guides[68] or regulations[69] that can resolve some of the ambiguities in the production of empirical studies to substantiate claims or test consumer beliefs for presentation in formal hearings. Regulations or guides could lead scientists by the hand through research processes that will avoid reaping the disfavor of or invalidation by the Commission, when proffered as evidence to rebut a challenge by the regulators.

Policy of a Sister Agency[70]

Unlike the FTC, the Food and Drug Administration (FDA) developed regulations to confront this demand for a threshold of acceptable scientific methodology. When submitting an application for approval of a new drug to the FDA, the applicant must prove the drug's effectiveness before gaining the agency's acceptance. Sufficiency of that proof requires a showing of "substantial evidence" of the potion's efficacy.[71] A further explication of this "substantiation" is described by the FDA as consisting of "adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug".[72] Without additional definition by the agency it would be impossible, or at the very least expensive and time-consuming, for a company to acquiesce. In absence of specification by the regulators of what they will accept as proof, a firm might be very likely to conduct costly and unnecessary replications of their tests, resulting in possible tremendous

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67 A further appropriate use of consumer evidence, though not addressed in the present discussion, would be in the *formulation* of an effective corrective message. The dilution of FTC-proposed corrections, clearly illustrated by *Warner-Lambert Co. v. FTC*, *supra* note 64, demonstrates a probable misunderstanding by the judiciary of the nature of human communication processes, and the sufficiency of a minimized corrective message to serve the goals of the agency. While there is no evidence that the Commission has used consumer research to identify the most appropriate message to correct prior misconceptions, at least one cease and desist order prohibited the depiction of fruit or juice on a product label until such time as consumer surveys reveal that deceptive effects of the prior labeling do not exceed specified percentages. *RJR Foods, Inc.*, 83 F.T.C. 7 (1973).

This application of behavioral studies is especially valuable to ensure that the parameters laid down in the name of the First Amendment are not breached. "[The First Amendment] triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved." *Warner-Lambert Co. v. FTC*, at page 758. This use of consumer research could, therefore, circumvent a charge that the corrective order is constitutionally overbroad.

68 16 C.F.R. §1.6. "Guides *may relate to a practice common to may industries* or to specific practices of a particular industry," (emphasis added) at §1.5.

69 16 C.F.R. §1.7, et seq. "[T]he Commission is empowered to promulgate trade regulation rules which define *with specificity* acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Such rules may include requirements prescribed for the purpose of preventing such acts or practices," (emphasis added) at §1.8.

70 The idea of drawing upon the approach of the Food and Drug Administration was recently espoused in Barnes, *supra* note 26.

71 21 C.F.R. §314.111(a)(5)(i) (1984).

72 *Id.*

economic waste, or even erecting an economic barrier to new-drug development. Consequently, the FDA promulgated regulations that outline acceptable scientific practices.[73]

The guidelines described by the FDA, while dealing specifically with drugs and with the "hard" sciences, can be adopted in principle by the FTC regarding not only its advertising substantiation program[74], which similarly may invoke the physical sciences, but also relating to the methodologies and standards encompassing behavioral research of advertising effects. This emulation by the FTC of its sister agency's standards was recently suggested by an Associate Law Professor and Director of the Center for Interdisciplinary Legal Studies at the Syracuse University College of Law, David W. Barnes.[75] Mr. Barnes draws the conclusion:

> The goals to be attained through these guidelines are simplification and prehearing settlement of evidentiary and legal issues, cooperation between parties, disclosure of relevant background materials, and clarification of substantive remedial requirements. Achievement of these goals will guarantee the integrity of fact-finding in deceptive advertising cases while intruding in the least restrictive manner on the free flow of commercial information.[76]

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73 21 C.F.R. §314.111(a)(5)(ii) (1984). The most relevant text of these regulations, which would apply well to FTC standards of scientific evidence, is as follows:

"(ii) The following principles have been developed over a period of years and are recognized by the scientific community as the essentials of adequate and well controlled clinical investigations. They provide the basis for the determination whether there is 'substantial evidence' to support the claims of effectiveness for 'new drugs' and antibiotic drugs.

(a) The plan or protocol for the study and the report of the results of the effectiveness study must include the following:

(1) A clear statement of the objectives of the study,

(2) A method of selection of the subjects that (*i*) Provides adequate assurance that they are suitable for the purposes of the study, diagnostic criteria of the condition to be treated or diagnosed, confirmatory laboratory tests where appropriate, and, in the case of prophylactic agents, evidence of susceptibility and exposure to the condition against which prophylaxis is desired.

(*ii*) Assigns the subjects to test groups in such a way as to minimize bias.

(*iii*) Assures comparability in test and control groups of pertinent variables, such as age, sex severity, or duration of disease, and use of drugs other than the test drug.

(3) Explains the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subjects response, and steps taken to minimize bias on the part of the subject and observer.

(4) Provides a comparison of the results of treatment or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data. Level and methods of 'blinding,' if used, are to be documented. Generally, four types of comparison are recognized:

(*i*) No treatment: . . . .

(*ii*) Placebo control: . . . .

(*iii*) Active treatment control: . . . .

(*iv*) Historical control: . . . .

(5) A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

Provided, however, That any of the above criteria may be waived in whole or in part, either prior to the investigation or in the evaluation of a completed study . . . ."

74 *Supra* note 46.

75 *Supra* note 45.

76 *Id.* at 43.

Aside from these practical benefits enumerated by Mr. Barnes, explicit parameters of scientific methodology will serve the added function of insulating the FTC from a charge that its requirements are void for being overly vague.[77] Where quantitative data is mandated by the Commission, compliance is impossible without offering sufficient direction.

Such provisions, of course, cannot be so restrictive as to prohibit research techniques that are new and progressive, or other unique methods, just because they are not applied by a majority of researchers. But, like the FDA guidelines, they can be broad while retaining some specifics, and could even go a step further by offering a non-exclusive list of presumptively acceptable techniques. This would go far in *assisting* behavioral and other empirical researchers.[78]

The next step, then, is to apply behavioral research to the realistic assessment of deceptiveness with an eye toward extra-judicial resolution of the facts at issue. This approach would be based upon objective measures of public beliefs and opinions, and would accurately assess whether a misrepresentation is *material*.[79] This can be achieved by looking, as we did with the FDA regulations, to another organization as a model.

Stage II: The Arbitration Model

A design for a pre-hearing empirical assessment of deceptive tendencies of challenged advertisements can be constructed by drawing from traditional contract arbitration procedures[80] as a dispute resolution

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77 *See, generally*, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). *See, also, NAACP v. Button*, 371 U.S. 415, 433 (1963); *Smith v. Goguen*, 415 U.S. 566 (1974); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). This principle is fundamental in testing the constitutional validity of a regulatory schema.

78 *See, e.g.*, Jacoby and Small, *The FDA Approach to Defining Misleading Advertising*, 39 J. Mktg. 65 (1975). These researchers suggest that there is a need to develop a research approach that can be used to evaluate ads that may require litigation, but that it is first necessary to define what constitutes "being misled." This would necessitate, for instance, some guidance as to how many consumers need be deceived before regulatory intervention is justified. Bernacchi, *Substantive False Advertising Standards: Discretion and Misinformation By The FTC*, 5 J. of Advertising 24 (1976), declares:

> The problem with the consumer survey method, presently, aside from its unattractive cost and time considerations, is its general lack of acceptability as a method of evidence introduction and the general failure to set standards in areas of a desired sample representativeness, instrument validity and reliability, an acceptable margin of error for the data and for data interpretation of the survey findings. *Id.* at 27.

79 One measure of materiality was expressed, *e.g.*, in *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943), that "the natural and probable result of the challenged practice is to cause one to do that which he would not otherwise do." This is a standard which would be impossible to equitably apply without research into human behavior. Any attempt to do otherwise would necessarily involve pure speculation by the agency.
Unfortunately, it is common practice for the FTC to do so.

80 Further information on arbitration can be found at F. Kellor, *American Arbitration, Its History, Functions and Achievements* (1948); Lippman, *Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives*, 24 Me. L. Rev. 215 (1972); Goldstein, *The Power of Arbitrators in Commercial Arbitration*, 26 Prac. Law. 69 (1980); F. Elkouri and E. Elkouri, *How Arbitration Works* (3rd ed. 1973).

model. The purpose of arbitration, like the intention here, is that it provides a system of conflict reduction that is, or is supposed to be, "better, more expeditious, and more economical than litigation."[81]

One of the greatest benefits to be realized from empirical studies is the economic factor of *avoiding* costly trials or administrative hearings, which can be substantial for the parties concerned. This can be achieved by a scientific showing prior to the hearing or trial of an advertisement's capacity or lack of capacity to deceive.

Additionally, when surveys or experiments are used in litigation they are often conducted separately by parties on both sides of the action. This is particularly true when the methodologies of the studies are in dispute. If opposing parties, however, will agree upon the manner of testing, and agree to an independent entity by which the appropriate research will be directed, further cost reduction will be accrued by those involved. Such an agreement will also immunize the viability of the agreed-upon methodology from attack by the regulatory authorities.

One particular problem with the use of consumer behavior research is that it can be tainted, reflecting the desires of the sponsor that commissioned it. As Ernest Gellhorn, then an Associate Professor of Law at Duke University, charged, "[P]artisanship and accurate surveys are an unlikely mixture."[82] Agreement of the parties as to the researcher to conduct the study, will effectively eliminate this threat to validity of the findings.

Finally, a great deal has been said about the proliferation of legal actions and the backlog of cases clogging the court dockets.[83] Not just the courts but also the administrative agencies are at a state of perpetual overload. Research commissioned jointly by the FTC and the marketer can be conducted toward the goal of out-of-court (or administrative hearing) settlement of the issue of deceptiveness, which might realize a net reduction in the number of cases being heard by the Commission. It might also result in more total dispositions of questionable advertising practices.

These benefits are sufficient in themselves to justify this means of alternative dispute resolution. By avoiding lengthy court dockets, time required for answers, replys, counterclaims, voir dire, pre-trial hearings, discovery, and so forth, a noticeable amount of costly time is frequently saved through the more informal structure of arbitration. It is not unusual for FTC actions to dwell for three or four years.[84] Some good examples of this, and not the only ones, are the *Listerine*[85] case, which persisted through an

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81 *The Arbitrator's role in Expediting the Large and Complex Commercial Case* 2 (April 1982), a publication of the American Arbitration Association.

82 Gellhorn, *supra* note 25, at 567.

83 Admittedly, however, the concern may be somewhat overstated, see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and think we know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4 (1983).

84 One study determined that the average case takes four years, Cox, Fellmeth, & Schultz, *"The Nader Report" on the Federal Trade Commission* 72 (1969). This incessant delay is referred to in *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974), as "the leisurely course typical of FTC proceedings."

85 *Warner-Lambert Company*, 86 F.T.C. 1398 (1975), *modified*, 562 F.2d 749 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

eight-year ordeal, the *Geritol*[86] case, which also took eight years, and *Carter Products*[87], which was 16 years in reaching a finale.

Beyond these benefits, as consequential as they may be, there is yet one plus that may pale the others. Arbitration, and the mechanism recommended herein, is non-public. The obvious advantage of this is the elimination, or minimization, of adverse publicity, which can condemn even the innocent marketer to an irreparable loss of sales or goodwill.[88]

The Procedure

The premise of the model is that an advertiser, when charged with an infraction of the deception standards of the FTC, should have the option of collaborating with the agency to the extent that they can jointly hire a social scientist to explore, through scientific testing, the behavioral impact of the published claims. To affect this objective it is first necessary for the two opposing paradigms to find sufficient common-ground to concur on the choice of which scientist will execute the project.

Here, the arbitration model suggests a particularly effective technique. The typical system applied in arbitration is for the parties to submit to the American Arbitration Association (AAA), a private non-profit organization established "to foster the study of arbitration, to perfect its techniques and procedures under arbitration law, and to advance generally the science of arbitration", a mutually signed *submission agreement.*[89] Upon receipt of this instrument the AAA assigns to the case one of its staff members as a tribunal administrator to oversee the process.

The administrator next sends to the parties identical copies of a specially prepared list of proposed arbitrators who are each technically qualified to resolve the controversy. The parties are then given just seven days to study the list, cross off any names to which they object, and to number the remaining names by order of preference. To assist their decision-making, abstracts of the arbitrators backgrounds and prior decisions are available to them.

Once the administrator receives the lists, the numbered names are compared for mutual selections. If the parties were unable to find a mutual choice on the list, additional lists may be sent at the request of the parties, otherwise the AAA will make an administrative appointment of its own choosing. In no case, though, will an arbitrator whose name was crossed out by either party be appointed.[90]

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86 *J. B. Williams Co., Inc. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

87 *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951; *Carter Products, Inc. v. FTC*, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884, *rehearing denied*, 361 U.S. 921 (1959); *Carter Products, Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963).

88 A discussion of the advantages of arbitration appears in Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 Notre Dame Law. 182 (1966).

89 A more complete discussion of the commercial arbitration procedures and background of the American Arbitration Association can be found in the organization's publication, *A Commercial Arbitration Guide for Business People* (April 1984).

90 *Id. See also* AAA publication, *Construction Contract Disputes: How they may be resolved* (Nov. 1980).

An alternative technique is often applied where the amount in controversy exceeds $25,000. This is known as "tripartite" selection.[91] In this instance each of the parties selects the arbitrator of their preference, and the two chosen arbitrators then select a third to act as a tie-breaker. Tripartite selection, however, has met with some resistance and controversy arising from the ethical dilemma created when normally "impartial" judges are expected to champion their nominators.[92]

Adapting this approach to an Advertising Dispute Resolution Model (ADRM) is a simple matter. To best effect it, however, requires administration by an independent source. This should present no substantial barrier to success. It is likely that an appeal to the American Arbitration Association, the American Sociological Association, the American Association for Public Opinion Research, or some other financially disinterested organization would quickly render a volunteer for this function.

The administrator should then collect a list of social scientists who are prominent and highly qualified researchers. Members of the sponsoring organization could nominate and elect a number of their peers as the "seed" group to form the initial list of ADRM researchers. Consideration of their experience in advertising research should be heeded. This is similar, too, to the AAA program, which takes arbitrators from nearly all fields of specialization through nominations by leading figures in those professions.[93] The initial researchers could then participate with the administrators in reviewing the qualifications of other candidates for potential addition to the list. Particular emphasis should be made to ensure that researchers outside the sponsoring agency are equally considered. The seed group can be particularly valuable in assisting the administrator to evaluate the acceptability, under contemporary scientific standards, of the methodologies and theoretical paradigms of the applicant scientists, to guarantee a high quality of research for ADRM actions.

Before a project is instituted, a statement of the research questions must be jointly drafted by the parties for the scientist's use. This statement can have the added feature of outlining some of the research method parameters. If no agreement is forthcoming between the parties, the hearing examiner's conception of the factual issues should govern. If the advertiser cannot then agree with the question as determined by the hearing examiner, it will be able to forego the ADRM option and continue through the conventional regulatory process. If the advertiser opts to continue with the ADRM, the parties will then submit the agreed research questions to the administrator to initiate the process.

Upon initiation of the ADRM option, the administrator will submit to both the advertiser and the FTC a list of qualified researchers, who are both capable of researching the questions as outlined in the submission agreement and available to begin the project in the very near future, with a comprehensive *curriculum vitae* of each. The parties will then be allowed seven working days to strike their objections and to number the balance.

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91 Roth, *Choosing an Arbitration Panel*, 6 Litigation 13 (1980); Glick, *Bias, Fraud, Misconduct and Partiality of the Arbitrator*, 22 Arb. J. 161 (1967).

92 *Id.*

93 *Supra* note 89, at 12.

The administrator's next step is to compare the lists and appoint a researcher to conduct the project. It is important that the researcher be insulated from any knowledge of the preferences made by the parties, so that there will be no bias introduced into the research from any feeling of obligation by the researcher to either party over the other.

An alternative to this process which might help to minimize bias of the administrator in the mechanism would be for the parties, rather than striking and numbering names and leaving the final decision to another entity, to alternately strike one name at a time on an odd-numbered list of names until just one name remains. This would limit the administrator's responsibility, as well.

Arrangements should then be made with the researcher through the administrator. No direct contact by either party should be necessary, or permitted, unless agreed by and in the presence of the opposing party.[94] For the sake of conducting the research with the maximum extent of isolation from bias, it would probably be best for there to be no contact whatsoever between the researcher and the parties. The administrator can serve as a *filter*, to transmit questions, answers, and comments between the parties and the researcher, documenting all such communications.

Findings

Research results may not be binding upon the FTC without raising a question of unlawful delegation of power.[95] This presents no practical problem, however. Agreement between the parties as to all factual issues in advance of the study would defuse the Commission's opposition if the results disproved its allegations.

Although this outcome would not be binding, the findings of the study would still have influence on the decision of the FTC to pursue the action or not, since the study can later be presented as evidence in the administrative hearing and the agency would be effectively estopped from attacking the research as defective, since the research design was of its own selection. The *fact* question would then already be resolved, leaving only the *legal* question, of what percentage of the population must be deceived for regulation to

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94 This follows the precedent of the AAA, which serves two purposes: a.) It relieves the arbitrator from the burdens of administration, and b.) it eliminates the danger that, in the course of conversations outside the hearing, one party may attempt to influence the arbitrator on the merits of the case without permitting the other party to rebut the allegations. The same principles apply to the ADR mechanism.

95 "Administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them ...." *Anderson v. Grand River Dam Authority*, 446 P.2d 814, 818 (1968), quoting 73 C.J.S. Public Administrative Bodies and Procedure §57. Restated as a general legal maxim, *State v. Copenhaver*, 184 P.2d 594, 608 (1947), declares "delegatus non potest delegare." This principle should have no impact upon the present proposal, since these courts and others specifically permit the delegation of mere ministerial functions and the use of advisory panels and experts, *see, e.g., N.L.R.B. v. Duval Jewelry Company of Miami*, 375 U.S. 1, 7 (1958). To make the findings of the researcher binding, however, would run counter to the underlying justification for delegation: that the final word and ultimate decision on the merits of all issues before the agency must be left to the agency. *N.L.R.B. v. Duval Jewelry Company of Miami, id.* at 8.

ensue, for resolution by the administrative law judge (ALJ) if it has not already been decided by that time.[96] This can be done on a rather spurious case-by-case basis, before submission of the research questions, allowing the ALJ the flexibility to consider factors such as the type of product and the target audience, or this, too, could be done by regulation.[97]

Ethics

Integrity of the research is the predicate of this model's viability as a fact-finding tool. An essential element of ensuring this integrity is a Code of Professional Responsibility. This ethical code can be compiled by combining aspects of the Code of Ethics for Arbitrators in Commercial Disputes[98], the Code of Ethics of the American Sociological Association[99], and the Code of Professional Ethics and Practices of the American Association for Public Opinion Research[100]. The following is offered as a recommended outline for such a code that might be adopted as an integral part of the ADRM model:

I. Integrity, Objectivity, and Fairness

A. The scientist has a responsibility to maintain the integrity and objectivity of the research, and to take all reasonable efforts to be fair to all sides of the factual dispute which forms the basis for the research question. The scientist has a responsibility to both the process and the parties, and must observe high standards of conduct to preserve the integrity , objectivity, and fairness of the research.

B. The ethical obligations of a scientist begin upon the acceptance of the appointment and continue throughout all stages of the project.

II. Selection and Acceptance of Appointment

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96 Cases have varied greatly in the percentage of the population deemed necessary to be capable of being deceived before the finding of a "capacity or tendency to deceive" will be upheld. Percentages as low as five percent, *A. A. Friedman*, 74 F.T.C. 1056 (1968), and fifteen percent, *Firestone Tire*, 81 F.T.C. 398, 415 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973), have been found sufficient, as have many other percentage figures. It is doubtful that any numbers this small, however, would be sustained upon hearing before the Commission, given its position announced in *Cliffdale*, 103 F.T.C. 110, 165 (1984), which purports to protect only consumers who act "reasonably," rather than "that vast multitude which includes the ignorant, the unthinking and the credulous" which were protected in the past. *See, e.g., Standard Oil Co. v. FTC*, 577 F.2d 653, 657 (9th Cir. 1978); *Giant Food, Inc. v. FTC*, 322 F.2d 977, 982 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964). *See additional discussion, supra* note 27.

97 One commentor has suggested a series of levels for different fact situations: a.) 1-5% deception level where a product directly involves the health and safety of the public, e.g., over-the counter drugs, b.) 10% deception for advertisements aimed solely at children or elderly persons, c.) 15-20% where the harm is strictly economic in nature, and d.) 30-40% where the advertising inflicts only commercial hurt on a competitor. Gerlach, *The Consumer's Mind: A Preliminary Inquiry into the Emerging Problems of Consumer Evidence and the Law*, a working paper prepared with the support of the Marketing Science Institution (December 1972).

98 This Code was prepared by a Joint Committee composed of a Special Committee of the American Arbitration Association and a Special Committee of the American Bar Association, in 1977. *See* Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 Bus. Law. 309 (1977).

99 *Toward a Code of Ethics for Sociologists*, 3 Amer. Sociologist 318 (1968).

100 Bailey, *Methods of Social Research* 518 (2d ed. 1982).

A. It is inconsistent with the integrity of the process for scientists to solicit appointment for themselves.

B. Scientists should accept appointment only if they can be available to conduct the research promptly.

C. Scientists should accept appointment only if they are qualified by education and experience to conduct the research in accordance with the parameters of the question as designated in the submission agreement, and should not misrepresent their own abilities, or the competence of their staff, to conduct a particular research project.

III. Bias and Financial Interests

After accepting appointment and while serving in the appointment, a scientist should avoid entering into any financial, business, professional, family, or social relationship, or acquiring any financial or personal interest which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

IV. Research Process

A. Where the agreement of the parties sets forth procedures to be followed in the research, it is the obligation of the scientist to comply with such procedures, or to obtain permission of the parties to make any changes that the scientist deems necessary or advisable.

B. The scientist shall not select research tools and methods of analysis because of their special capacity to yield a desired conclusion, and shall not knowingly make interpretations of research results, nor tacitly permit interpretations, which are inconsistent with the data available.

C. Scientists must present their findings honestly and without distortion, omitting no data from a research report which must significantly modify their interpretation of findings, and the scientists must indicate with specificity where and how their own theory, method, research design, or paradigm may bear upon or influence interpretation.

D. Deficiencies or weaknesses known by the scientist to be inherent in the study as conducted must be fully discussed in the findings, to permit an informed decision to be founded thereon.

V. Communications

A. Scientists shall not communicate with the parties to the controversy except through the administrator, unless agreed upon in writing by all parties to the controversy.

B. Unless otherwise agreed by all parties, or required by applicable rules of law, the scientist should keep confidential all matters relating to the research project and findings.

C. It is not proper at any time for the scientist, or anyone working with or for the scientist, to inform anyone of the research findings in advance of the time they are given to all parties.

Implementation of these ethical standards in conjunction with the ADRM procedures will lend confidence to the research findings of the various scientists, helping to give them legal relevance and

credence. This allows recourse by the Commission in the event that research was conducted improperly, and this channel of recourse might additionally discourage the FTC from alleging impropriety if the study's results are presented in court, since it would then be obliged to prosecute for violation of these ethical regulations thereby necessitating that it prove its charges.

A Trial Run

A joint study has been undertaken in at least one case. It did not involve the procedural approach described above, but it does suggest a possibility for the FTC and a respondent to work together to commission studies.

Yamaha International, Inc.[101], involved a series of Learn-To-Ride Safety Seminars sponsored by the manufacturer of motorcycles. The advertising for these seminars stated, in part, that "... the motorcycle is becoming as popular as the automobile. Yamaha believes—with proper instruction—it can be just as safe. We invite everyone in America to learn to ride." The FTC, to the contrary, felt that no amount of instruction can make a two-wheel unenclosed vehicle as safe as a four-wheel enclosed vehicle, and charged Yamaha with deceptive advertising.[102] The issues of the case concerned the understanding that consumers would derive from this advertising, and it was decided that research could resolve this question. A pilot study, jointly commissioned, was agreed upon to explore the issues. Following that pilot study, which was only intended to be preliminary, a more scientifically rigorous study would then be in order. Four researchers, two from the FTC and two from Yamaha, were engaged to work out the research design.

Unfortunately, a final study was never conducted. The pilot study, despite its inadequacies, was so strongly supportive of the FTC position that Yamaha entered into a consent agreement without further convincing.[103]

Summary

This article has discussed the need for innovation in advertising regulation and some steps that might easily be adopted to introduce such progress. Instruments are readily available to the regulators that can significantly reduce the amount of speculation applied in determining the salient facts at issue in these cases. Much of the fault in the previous lack of use of these tools is on the advocates presenting the cases, but the onus should now be on the Commission to make it easier to offer empirical data into evidence or to avoid the need for litigation.

The first step in this process is for the Commission to promulgate, as either industry guides or regulations, a basic outline as to what it considers sufficient scientific methods to justify a "reasonable

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101 86 F.T.C. 973 (1974).

102 Hunt, *The FTC-Yamaha Joint Research Project*, in The Center for Public Resources, *Dispute Management: A Manual of Innovative Corporate Strategies for the Avoidance and Resolution of Legal Disputes* (1980).

103 *Id.*

basis" to substantiate advertising claims and to measure advertising effects. This should include both general, broadly defined, methodology as well as some specific examples of presumptively acceptable techniques. This would assist companies in collecting empirical data, so that their efforts are not spent fruitlessly. Failure to provide these parameters is at the very least unfair to advertisers, and in certain instances might be vulnerable to a charge of being unconstitutionally violative of procedural due process.

The next step is to take further advantage of empirical studies, by applying them to the early resolution of disputes over the deceptive likelihood of advertisements. This can be accomplished through the FTC and the advertiser jointly commissioning research, and bearing the costs equally.

Although *Yamaha* represents a trial run of the basic concept discussed here, and in that case it worked to the benefit of the FTC, no systematic procedure has been established to encourage this approach. Such a procedure is outlined here. It is not intended as a comprehensive model, but as a starting point.